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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND WILLIAM CAMPBELL, Defendant and Appellant.	C085728 (Super. Ct. No. 62146195)

Defendant Raymond William Campbell was found guilty of several offenses, including making a criminal threat under Penal Code section 422.[1] He was sentenced to serve five years eight months in prison.

Defendant contends (1) insufficient evidence supports his criminal threats conviction because no evidence showed he made a threat that had an imminent prospect of execution and (2) the trial court had a sua sponte duty to instruct the jury on attempted

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[1] Undesignated statutory references are to the Penal Code.

criminal threats as a lesser included offense to the criminal threats charge. We conclude sufficient evidence supports defendant's criminal threats conviction, and the trial court did not err in refusing to instruct the jury on the lesser included offense of attempted criminal threats. We affirm the judgment.

FACTS AND PROCEEDINGS

An April 2017 information charged defendant with shooting at an inhabited dwelling (§ 246, count one), assault with a firearm (§ 245, subd. (a)(2), count two), and making a criminal threat (§ 422, count three). For count one, it was alleged defendant personally used a firearm during the offense (§ 12022.53, subd. (d)). For count two, it was alleged defendant inflicted great bodily injury on the victim (§ 12022.7, subd. (a).) The evidence at trial showed the following.

The victim lived in the remote community of Alta in Placer County. In April 2016, the victim met defendant, who was visiting her neighbor. They began dating, and the next month they decided to take a road trip to Arizona to visit her daughter. The victim drove defendant's recreational vehicle (RV) and defendant rode his motorcycle.

Defendant apparently kept a large sum of money in the saddle bag of his motorcycle. On May 4, 2016, defendant discovered the money was missing and accused the victim of stealing it. He held a knife to her throat and threatened that "[i]f you took my money, I'll fucking kill you." The victim was frightened, and she believed defendant would carry out the threat. The victim denied taking defendant's money. Defendant went to bed and the victim, who was unable to leave given their remote location at the time, slept on the couch.

The next morning the victim drove the RV and defendant rode his motorcycle. At some point during the journey, they became separated. The victim then changed her route and drove the RV toward home. She contacted a friend who picked her up near

Sacramento. The victim parked defendant's R.V. and sent him a text message telling him where it was located. She returned to Alta and went to another friend's house to hide because she was afraid of defendant.

Over the next few weeks, defendant sent the victim multiple threatening text messages accusing her of taking his money and demanding that she return it. On May 8, 2016, defendant texted the victim, "Wut next blaze or blood? N I won't stop till I feel rite about your wrong. Sorry bout your luck cuz wut u did aint no rite about it so fuck you." A short time later, he texted: "Looks like hell it is thanx a lot bitch didn't want to have to do this. You want blood? Blood is what you will get. Givit back or die." He then texted her: "Fukn cunt you are going to regret this I promise you." Finally, he sent the victim a text stating: "You are forcing me into being someone I don't want to be. Im beggin you please givit back and I won't do this you got till the end of the day to contact me or everything you love and know will burn or bleed and its all on you."[2] On May 13, defendant texted the victim: "I wont be so nice tonight someone will bleed givit back or suffer the consequences." On May 18, defendant texted, "Every dog has his day. I will be seein you all reali soon have a nice day."

The victim testified that the text messages scared her. She believed defendant was capable of following through with the threats. Because he knew where she lived and she was trying to hide from him, she stayed with friends and eventually moved in with her on-again, off-again boyfriend, A.A., at his home in Alta. She testified that during the period defendant texted her the threatening messages, he was looking for her in Alta, regularly visiting the locations she was known to frequent.

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[2] Although defendant continued to text the victim, the criminal threats counts was based on the above text messages from May 8, 2016.

Defendant had heard the victim was living with A.A. Around the middle of June 2016, defendant went to A.A.'s house to see if the victim was there. Another woman living on the property fired a shot in defendant's direction. Defendant later returned to A.A.'s house and shot up the front gate that covered the driveway to the house.

On June 21, 2016, defendant showed up at A.A.'s house around 8:00 a.m. A.A. and the victim were sleeping inside. Their dogs started barking and they heard someone yelling outside. The victim looked outside and saw defendant by the front gate. A.A. walked down to the front gate, which was about 100 yards downhill from the house. He was carrying a rifle for protection. The victim hid in a loft in the house with another gun.

When A.A. got to the gate, defendant asked if the victim was there, and A.A. told him she was not. Defendant then asked A.A. if he wanted to smoke methamphetamine. A.A. agreed, and said he would be back. A.A. returned to his house and then got in his car and drove back down to the front gate where he had left defendant. When he arrived at the gate, defendant was no longer there. A.A. immediately returned to the house. He placed a video baby monitor on the hood of his car that was parked out front, and watched the monitor to see if he saw defendant outside.

After a few minutes, he saw defendant approaching the house carrying a shotgun. A.A. opened the door and fired a rifle. He struck defendant in the side. As A.A. was closing the door, defendant returned fire, shooting his shotgun five times. Buckshot from the shotgun struck A.A. in the arms, face, and chest. Defendant then shot a nearby water tank two more times before he left on his motorcycle. The victim called 911 to report the shooting.

A short time later, defendant was pulled over by police. Officers found a handgun and ammunition on defendant and a shotgun in the saddlebag of his motorcycle. After

waiving his *Miranda* rights, defendant spoke with law enforcement officers. The recorded interview was played for the jury.

During the interview, defendant admitted he had gone to the house to see the victim and he shot A.A. He said he had told A.A. he did not have a problem with him when A.A. suddenly opened fire and shot him. He shot back. Defendant also explained the victim had taken money from him and he had been looking for her.

Defendant did not testify on his own behalf, but he did call an officer who interviewed A.A. at the hospital following the shooting. The officer testified A.A. gave three different versions of the shooting. He also called Travis Proctor, who used to be friends with A.A. Prior to the shooting, Proctor had told defendant A.A. was dangerous and he had guns. A defense expert opined the physical evidence indicated the door to A.A.'s house was open when some of the shotgun shots had been fired.

The jury found defendant guilty of all charges, but found the alleged enhancements not true. Defendant was sentenced to serve an aggregate term of five years eight months in prison; five years for the shooting at an inhabited dwelling offense and a consecutive eight months for the criminal threats offense. The court stayed the sentence on the assault with a firearm offense under section 654. Defendant filed a timely notice of appeal.

DISCUSSION

I

Sufficiency of the Evidence

Defendant contends insufficient evidence shows he made a threat that had an imminent prospect of execution since he did not know the victim's location or how to find her at the time he made the threats on May 8. We view the evidence differently and conclude a reasonable jury could have found defendant's threats conveyed an immediate prospect of execution.

In assessing the sufficiency of the evidence, we "review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Hill* (1998) 17 Cal.4th 800, 848.) We may not reweigh the evidence or substitute our judgment for that of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[O]ur opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*Hill*, at p. 849.) Reversal for insufficient evidence is required only if it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*Johnson*, at p. 578.)

The crime of criminal threat is set forth in section 422. "In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat--which may be 'made verbally, in writing, or by means of an electronic communication device'--was 'on its face and under the circumstance in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*).)

"Section 422 makes illegal a threat which conveys a gravity of purpose and the 'immediate prospect of execution.' " (*People v. Melhado* (1998) 60 Cal.App.4th 1529,

1538.) The word "immediate" means a "degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out, should the conditions not be met." (*Id.* at pp. 1532, 1538 [defendant's threats that he was going to blow mechanic away with a grenade if he did not return defendant's car after defendant failed to pay for services constitutes sufficient threat under section 422].) The statute, however, "does not require an immediate ability to carry out the threat." (*People v. Lopez* (1999) 74 Cal.App.4th 675, 679.)

A threat, moreover, " 'is not insufficient simply because it does "not communicate a time or precise manner of execution . . . ." ' " (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431-1432 [threats made while the defendant was incarcerated were sufficiently "immediate" for purposes of section 422 given the totality of the circumstances including prior physical violence against victim].) " ' "[S]ection 422 does not require those details to be expressed." ' " (*Ibid.*) Rather, "[t]he totality of the circumstances must be considered in addition to the words used." (*People v. Smith* (2009) 178 Cal.App.4th 475, 480.)

Viewing the evidence in the light most favorable to the judgment, we conclude defendant's May 8 threatening text messages conveyed an "immediate prospect of execution" even though defendant may not have known the victim's precise location when he sent them. (*People v. Lopez, supra,* 74 Cal.App.4th at p. 679.) After defendant held a knife to her throat and threatened to kill her, the victim returned to Alta, where defendant knew she lived. When he learned she had left, defendant went back to Alta to find her. While he was looking for her in Alta where she was hiding, defendant sent the victim multiple threatening text messages. Defendant knew the victim's home address and also knew several locations where she generally hung out. The victim was aware defendant was constantly looking for her, visiting places where she was known to visit. Defendant also repeatedly asked persons in the area where the victim was staying, and

quickly learned she was staying at A.A.'s house. Defendant visited the house on three separate occasions looking for the victim. The third time, the victim was at the house with A.A. when he and defendant got into the gun fight.

Based on this undisputed evidence, a reasonable jury could conclude defendant's threats that everything the victim knew and loved would burn or bleed if she did not return the money he accused her of taking, combined with his violent assault with the knife and his continuous efforts to find her in Alta where he knew she lived, conveyed to the victim a gravity of purpose and immediate prospect of execution. Other cases have found sufficient evidence of an immediate prospect of execution of a threat even though the defendant did not have immediate access to the intended victim.

For example, in *People v. Gaut, supra*, 95 Cal.App.4th at pages 1429 at pages 1431 through 4132, the defendant's violent conduct in jail combined with his imminent release from custody lent sufficient specificity and gravity to his threats to kill the victim. In *People v. Smith, supra*, 178 Cal.App.4th at pages 479 through 481, threats to a victim in California conveyed an immediate prospect of execution even though the defendant made the threats while in Texas while he did not have a job or income. And, in *People v. Wilson* (2010) 186 Cal.App.4th 789 at pages 814 through 816, the court found sufficient evidence of immediacy where an inmate threatened a correctional officer he would "blast" him when he was released on parole in 10 months. The *Wilson* court found the defendant "effectively made an appointment to kill [the officer] at his earliest possible opportunity--he would perform the act the instant he was set free." (*Id.* at p. 814.) In so finding, the court rejected the defendant's argument there was no evidence he had the ability to "find" the officer upon his release on parole. (*Id.* at p. 815.)

Here, as in *Gaut*, *Smith*, and *Wilson*, the foregoing evidence constitutes substantial evidence defendant made a criminal threat against the victim that met the immediacy requirement. Defendant's text messages evidenced a threat of great bodily injury against

the victim to be carried out at the earliest possible opportunity. Based on the totality of the circumstances, a trier of fact could reasonably conclude the victim would understand the threats conveyed a degree of seriousness and imminence such that defendant would follow through on the threats he made, as he knew where the victim lived and actively sought to locate her shortly after and during making the threats.

II

Lesser Included Offense Instruction

Defendant contends the trial court erred by failing to instruct the jury on attempted criminal threats as a lesser included offense of making criminal threats. He argues the absence of such an instruction violated his federal and state due process rights. We conclude there was no error.

In any criminal case, the trial court must instruct on the general principles of law relevant to the issues fairly raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) That obligation includes instructing on lesser included offenses if evidence is presented that, " 'if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) "The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given." (*Breverman*, at p. 154.) The court's sua sponte duty thus "prevents the 'strategy, ignorance, or mistakes' of *either* party from presenting the jury with an 'unwarranted all-or-nothing choice,' encourages 'a verdict . . . no harsher *or more lenient* than the evidence merits' [citation], and thus protects the jury's truth-ascertainment function' [citation]." (*Id.* at p. 155.)

In deciding whether there is substantial evidence to support a lesser included offense instruction, a court determines only the bare legal sufficiency of the evidence, not its weight. (*Breverman, supra*, 19 Cal.4th at p. 177.) In doing so, courts "should not

evaluate the credibility of witnesses," which is a task for the jury. (*Id.* at p. 162.) We review the trial court's failure to instruct on a lesser included offense de novo, considering the evidence in the light most favorable to the defendant. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

Attempted criminal threat is a lesser included offense of making a criminal threat. (*Toledo, supra,* 26 Cal.4th at p. 226.) "[A] defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. Furthermore, in view of the elements of the offense of criminal threat, a defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety." (*Id.* at pp. 230-231.)

A variety of circumstances fall within the reach of the offense of attempted criminal threat. (*Toledo, supra,* 26 Cal.4th at p. 231.) Such situations generally involve "a fortuity, not intended by the defendant, that has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*Ibid.*)

For example, "if a defendant takes all steps necessary to perpetrate the completed crime of criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person, the defendant properly may be found guilty of attempted criminal threat." (*Toledo, supra,* 26 Cal.4th at p. 231.) Likewise, "if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason, the threatened

person does not understand the threat, an attempted criminal threat also would occur." (*Ibid.*) "[I]f a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat." (*Ibid.*)

In this case, defense counsel originally requested that the court instruct the jury on attempted criminal threat as a lesser included offense. The court took the request under submission and later questioned counsel about the applicability of such an instruction. The court had "some difficulty seeing how that instruction would apply . . . . [The victim] testified that she did receive the message, that it [] came from your client's phone number. So I'm just having some difficulty seeing why I would give a lesser-included on that offense." Defense counsel responded, "That's fine, your Honor. I had put that 'attempted' in there prior to trial even starting." Counsel withdrew her request for the lesser included offense instruction.

Even if defense counsel had not withdrawn the request, given the evidence at trial, an instruction on attempted criminal threat was not warranted. None of the attempted criminal threat scenarios discussed in *Toledo* were present. (*Toledo*, *supra*, 26 Cal.4th at p. 231.) Instead, the victim testified she received the threatening text messages; she understood the threats; defendant knew where she lived; she was hiding from him, knowing he was looking for her; and she was very scared defendant would carry out the threats. Given the totality of the circumstances, the jury would have convicted defendant of criminal threats or not at all.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
MURRAY, Acting P. J.

/s/
DUARTE, J.